

No. 77-122

Supreme Court, U. S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

ROYAL W. SIMS AND THE R. W. SIMS TRUST, *Petitioners*

v.

WESTERN STEEL COMPANY

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 551 F.2d 811. The opinion of the district court granting partial summary judgment to petitioners (Pet. App. 23a-32a) is reported at 403 F. Supp. 450. Other orders and findings of the district court (Pet. App. 21a-22a, 33a-47a) have not been reported.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1977. By order dated June 11, 1977, Mr. Justice White extended the time for filing a petition

for a writ of certiorari to and including July 21, 1977 (Pet. App. 48a). The petition was filed on the latter date. The jurisdiction of this Court has been invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals properly considered the affirmative defense of release which, despite the district court's determination that it had not been timely raised, had been fully considered by the district court and argued by the parties.

2. Whether the court of appeals' decision should be reviewed in order to afford an opportunity to resolve the "bitter personal controversy" that allegedly exists between the district judge in whose court this case originated (Hon. Willis W. Ritter) and various judges of the court of appeals.

STATEMENT

The complaint in this case charged Western Steel Company ("Western") with having breached an ancillary provision of a license agreement authorizing Western to manufacture and sell a concrete mixer under a patent owned by petitioners. Petitioners also charged Western under 35 U.S.C. § 271(b) (1970) with having induced a third party to infringe the patent. Following proceedings on summary judgment limited to the breach of contract claim and a subsequent bench trial on the inducement claim, the district court entered judgments against Western on both causes of action (Pet. App. 21a-47a). The court of appeals reversed and remanded with instructions to dismiss the complaint (*id.* at 1a-20a).

The evidence before the district court showed that Western had obtained from petitioners in December 1968, in settlement of litigation, a non-exclusive license to manufacture and sell the forward discharging concrete mixer described in United States Patent No. 2,859,949.¹ The license agreement authorized Western to manufacture such mixer units until the inventory it had accumulated pursuant to an earlier agreement with petitioners had been exhausted or until March 12, 1971, whichever occurred earlier (Pet. App. 34a-35a). The agreement also provided that (*id.* at 17a):

All engineering drawings, plans, designs and specifications covering the Forward Discharge Transit Concrete Mixer within the concept of the Patent Rights of Licensor under this License, shall be[,] upon termination of this License as provided herein, returned to Licensor at the date of termination. * * *

While Western was producing three-axle models under the 1968 license agreement, Rite-Way, Inc. ("Rite-Way"), was manufacturing four and five-axle models of the patented mixer units under a separate license agreement with petitioners (Pet. App. 4a, 36a). Petitioners continued Rite-Way's license through the first several months of 1971, at which time petitioners conveyed to Beta Corporation ("Beta") all of their rights under the patent.² Beta in turn issued a license

¹ United States Patent No. 2,859,949 was issued to J. Jack Willard on November 11, 1958. Petitioners thereafter acquired by assignment all rights, title and interest in or conferred by the patent (Pet. App. 33a-34a).

² Although petitioners and Beta did not execute a formal license agreement until February 28, 1972, they made the agreement effective retroactively to June 12, 1971 (Pet. App. 4a).

to Rite-Way, effective July 1, 1971, giving Rite-Way a limited right to manufacture three, four and five-axle mixer units as well as replacement parts. Although the Beta/Rite-Way agreement contained an expiration date of August 31, 1971, Rite-Way continued its manufacturing beyond that date—placing a portion of the proceeds of its sales of the patented mixer units into a royalty reserve (*id.* at 4a).

On September 17, 1971, Western delivered to Rite-Way xerox copies of certain drawings that Western itself had developed in the process of manufacturing three-axle mixer units (Pet. App. 5a).³ Prior to receiving Western's drawings, Rite-Way had manufactured two complete three-axle units (*id.* at 6a). A division manager of Western testified that he had provided the drawings to Rite-Way to ensure that replacement parts would be available for the mixer units that Western had manufactured and sold before phasing out of the market (*ibid.*).⁴ No other evidence was presented concerning the purpose of delivery of the drawings.

Petitioners filed a patent infringement suit against Rite-Way in 1973, seeking to recover royalties for the three, four and five-axle mixer units that Rite-Way had manufactured and sold both before and after

³ Western charged Rite-Way only the cost of reproducing the drawings, at the rate of approximately \$.46 per print (a total of \$109.31) (Pet. App. 2a n.*; *see also id.* at 37a). Although petitioners contended originally that Western had given some manufacturing drawings to Rite-Way in 1969, the court of appeals found no evidence to support that contention (*id.* at 5a)—and petitioners apparently have abandoned the claim in this Court (*see* Pet. 7). Western did supply to Rite-Way in 1969, in connection with merger negotiations that ultimately proved unsuccessful, certain customer lists and schedules disclosing Western's assets (Pet. App. 5a, 36a).

⁴ See discussion at note 11 *infra*.

petitioners transferred their patent rights to Beta (*see* Pet. 7). Under an agreement subsequently entered into by petitioners and Rite-Way, petitioners agreed to accept \$360,000 in full settlement of their accrued royalty claims (Pet. App. 3a).⁵ Petitioners also executed a document unconditionally releasing Rite-Way from further liability with respect to any infringement of their patent that may have occurred prior to consummation of the settlement agreement (Pet. 7-8). The United States District Court for the District of Utah entered a judgment evidencing the settlement on February 4, 1974 (*see* Pet. App. 4a).

After having resolved their patent infringement dispute with Rite-Way, petitioners filed the present suit against Western. On December 20, 1974, the district court granted petitioners' motion for partial summary judgment—holding that the "return" provision of the 1968 license agreement (*see* page 3 *supra*) obligated Western to deliver to petitioners all plans and drawings relating to petitioners' patent, whether furnished by petitioners or developed solely by Western (Pet. App. 21a-22a; *see also id.* at 28a-29a). Despite the inducement claim asserted by petitioners, the only matter reserved in the order granting petitioners' motion for partial summary judgment was the determination of damages for Western's breach of the "return" obligation imposed by the 1968 license agreement (*id.* at 22a).

Prior to the hearing on damages, Western moved to dismiss petitioners' action on jurisdictional grounds.

⁵ At the time of the settlement agreement, Rite-Way had reserved royalties totaling \$491,000 (Pet. App. 3a). Rite-Way presumably owed a portion of those royalties to Beta Corporation for mixer units manufactured after July 1, 1971 (*see* discussion at pages 3-4 *supra*).

In support of that motion, Western pointed out that petitioners' breach of contract claim was based exclusively upon state law and argued that, before exercising pendent jurisdiction over that claim, the court should have required petitioners to demonstrate that their federal claim, inducement of infringement, was substantial and that their federal and state claims derived from a common nucleus of operative facts. Western contended that petitioners' inducement claim was insufficient to support pendent jurisdiction since, *inter alia*, the evidence showed that Rite-Way had not used Western's drawings and that, in any event, petitioners' release of Rite-Way operated to release Western as well. The failure of petitioners to pursue the inducement claim and of the court to retain jurisdiction over that claim was urged as further evidence that the claim was wholly without merit (*see* Pet. App. 27a).⁶ The district court denied Western's motion to dismiss, holding that it had pendent jurisdiction over petitioner's state claim and rejecting Western's contentions concerning the Rite-Way release (Pet. App. 25a-28a). The court entered an order on September 23, 1975, awarding petitioners compensatory damages of \$191,426 for breach of contract,⁷ \$150,000 for conversion of trade

⁶ Western also contended that petitioners' inducement claim was without merit because petitioners had conveyed all of their rights under the patent to Beta Corporation prior to the alleged inducement (Pet. App. 25a, 27a).

⁷ The court based its award of compensatory damages on petitioner Sims' projection of the profits he would have realized in the market for replacement parts for three-axle mixer units during the period from 1971 through 1974, but for Western's alleged breach of the 1968 license agreement (Pet. App. 31a). Testimony in the record, ignored by the district court, showed that any company having access to completed three-axle mixer units could have copied individual parts and entered the replacement market for them.

secrets (which had not been alleged or argued), punitive damages of \$100,000, plus costs and attorneys' fees, yet to be determined (*id.* at 23a-32a).

On October 20, 1975, Western filed a notice of appeal from the district court's money judgment on the state claim and moved to stay any further proceedings in the district court. The court of appeals denied the motion for a stay on February 2, 1976. On March 26, 1976, Western moved in the district court for an order compelling petitioners to provide complete answers to interrogatories it had served and setting trial on the inducement claim at least thirty days after such answers had been received. On April 5, 1976, Western requested a hearing on its pending motions. At the same time, Western requested leave to amend its answer to plead the Rite-Way release as an affirmative defense. The district court denied Western's motion to add the defense of release at the beginning of trial on the inducement claim, which was held on April 28, 1976, on the ground that it was not timely filed (*see* Pet. App. 44a-45a).

On May 8, 1976, the district court entered judgment against Western on petitioners' inducement claim on the ground that Western's delivery to Rite-Way of drawings for three-axle mixer units had induced Rite-Way to infringe petitioners' patent. The court held further that petitioners were entitled to recover from Western their lost profits (in addition to the \$441,426 judgment already entered in their favor by reason of such delivery), measured by the total royalties reserved by Rite-Way—or \$491,000. The court then trebled that amount, after finding that Western's actions had involved bad faith, and again awarded costs and

attorneys' fees in amounts yet to be determined (Pet. App. 33a-47a).

A unanimous panel of the court of appeals, comprised of Judges McWilliams, Barrett and Doyle, reversed the district court's judgments and remanded with instructions to dismiss the complaint. The court of appeals approved the district court's exercise of pendent jurisdiction over petitioners' breach of contract claim (Pet. App. 15a-16a). It determined, however, that the district court had erred in holding that Western's contractual obligation to "return" to petitioners "[a]ll engineering drawings, plans, designs and specifications covering the Front Discharge Transit Concrete Mixer" encompassed materials developed exclusively by Western as well as those given to it by petitioners (*id.* at 17a-19a). The court pointed out that "[f]rom the legal definitions, there can be a return only if there ha[s] been a prior delivery" and that none of the drawings given to Rite-Way had been supplied by petitioners (*id.* at 19a). The court also noted that the only evidence tending to show that petitioners had suffered injury as a result of not receiving the drawings was petitioner Sims' assertion that he had planned to use them to make replacement parts from which he expected to make a profit (*ibid.*). The court discounted that assertion because, even though Western had retained the originals of the drawings, petitioners had not requested copies until the time of trial (*id.* at 20a). According to the court, "[o]ne gets the impression that this entire claim was the product of afterthought. In the face of this record we find it impossible to given any credence to the adjudication and award" (*ibid.*).^{*}

^{*} The court of appeals also vacated the award for damages for

The court of appeals concluded further that petitioners had failed to show that Western had induced Rite-Way to infringe petitioners' patent. The court noted that liability under 35 U.S.C. § 271(b) arises only when the alleged inducement has been both active and intentional and that petitioners' evidence did not satisfy either of those requirements (Pet. App. 10a). The court pointed out that, [t]o the contrary, there was strong positive evidence that there was no intent whatsoever on the part of Western to induce an infringement" (*id.* at 10a-11a). Alternatively, the court held that, under applicable Utah law, petitioners' failure to reserve any right of action against Western while unconditionally releasing Rite-Way from liability for infringement of their patent precluded recovery against Western premised upon an inducement theory (*id.* at 12a-15a).^{*}

conversion of trade secrets. The district court had ordered Western to pay petitioners \$150,000 for conversion of trade secrets despite the fact that petitioners had not requested such an award (Pet. App. 9a). In vacating the award, the court of appeals stated (*id.* at 10a):

Since Rite-Way • • • had been in the business [of manufacturing three-axle units prior to receipt of Western's drawings], it is hard to see how these [i.e., the drawings] could have been trade secrets. And because Rite-Way • • • had a license any trade secrets should have been published thereby. That is what a patent and a license agreement are all about. So it is incongruous to talk about trade secrets in this context. • • •

The court also vacated the award of punitive damages for the alleged breach of the 1968 license agreement "[s]ince the record reveals nothing to justify a finding that Western acted maliciously, the manifest weight of the evidence is to the contrary" (*ibid.*).

^{*} The court found additionally that the damages awarded to petitioners for Western's alleged inducement of Rite-Way were "so disproportionate as to be shocking" (Pet. App. 11a). As already noted, the district court had measured petitioners' damages for

ARGUMENT

Petitioners readily concede that a case such as this "would not ordinarily warrant the attention of this Court" (Pet. 5). Indeed, the only portion of the court of appeals' decision specifically challenged involves a simple procedural question—whether the court of appeals properly considered the defense of release despite the district court's determination that Western had not raised that defense in a timely fashion. But since the conclusion of the court of appeals with respect to the defense of release constituted only an alternative basis for its decision, which is fully supported on other unchallenged grounds, there is no reason for this Court to entertain the procedural question presented by petitioners.

It is not, in any event, upon this asserted procedural error that the petition mainly rests but upon a charge that three members of the court of appeals—one of whom sat on the panel in this case—are unable to deal dispassionately with appeals from decisions rendered

inducement by the total royalties reserved by Rite-Way, or \$491,000. The court then had trebled that amount, for a total award of \$1,473,000, and ordered Western to pay petitioners' attorneys' fees (*id.* at 45a-47a). The court of appeals pointed out that Rite-Way had obligated itself to pay petitioners \$360,000 of the \$491,000 reserved by it as royalties pursuant to the 1974 settlement agreement (*id.* at 3a). The court noted further that Western's drawings related only to three-axle mixer units and that, even assuming that Western was responsible to petitioners for all three-axle units produced by Rite-Way after receipt of Western's drawings, petitioners' damages could not have exceeded \$18,000 (twelve units at an agreed upon royalty of \$1,500 per unit) (*id.* at 3a n.1, 11a). The remaining royalties reserved by Rite-Way were for four and five-axle mixer units, not described in the drawings furnished by Western and manufactured by Rite-Way both before and after it had received Western's drawings (*ibid.*).

by Judge Ritter. Respondent obviously is in no position to offer a comprehensive assessment of the fairness of the treatment accorded litigants in other cases or to respond to Judge Ritter's affidavit in support of the petition (Pet. App. 49a-55a). What is clear, however, is that the court of appeals correctly and fairly resolved the issues presented in this case. That should be the complete answers to petitioners' prayer that this case be used as a vehicle for instructing the court of appeals on the handling of appeals from Judge Ritter's court.

1. Contrary to petitioners' suggestion, the court of appeals did not "bas[e] its decision almost entirely on the so-called release" given to Rite-Way in 1974 (Pet. 18-19). Although the court resolved the release issue adversely to petitioners, it concluded, quite apart from the release, that Western had not breached the 1968 license agreement with petitioners and had not induced Rite-Way to infringe petitioners' patent. More specifically, the court held that the 1968 agreement obligated Western to return to petitioners only those materials, relating to petitioners' patent, originally supplied by petitioners (Pet. App. 17a-19a). Since petitioners had not supplied Western with any such materials, the court correctly concluded that Western had not violated its contractual commitment (*id.* at 19a). With respect to the inducement claim, the court held that petitioners had failed to establish, as required by 35 U.S.C. § 271(b), either that Western actively participated in Rite-Way's alleged infringement of their patent or that Western had acted with the intent to induce an infringement (*id.* at 10a-11a).¹⁰

¹⁰ It is settled, of course, that the manufacture and sale of replacement parts for patented products does not constitute patent

Since petitioners have not challenged in this Court the court of appeals' holdings that Western did not breach the 1968 agreement and did not induce infringement of petitioners' patent, holdings that fully warranted its disposition of the appeal, there is no reason for this Court to determine whether the court of appeals properly considered the defense of release.

The release issue would not, in any event, warrant the attention of this Court, even if it were the sole basis of the decision below. The district court's refusal to permit Western to amend its answer before trial expressly to raise the defense of release was inconsistent with the letter and the spirit of the Federal Rules. The court of appeals acted well within the scope of its discretion in correcting that error on appeal.¹¹

infringement. *E.g.*, *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 528-29 (1972); *Aro Mfg. Co. v. Convertible Top Co.*, 365 U.S. 336, 344-46 (1961). Similarly, the furnishing of drawings to an unlicensed person does not amount to inducement to infringe unless the drawings actually are used to manufacture infringing devices and are furnished with the intent that they be so used. *See, e.g.*, *Aro Mfg. Co. v. Convertible Top Co.*, 377 U.S. 476, 488-93 (1964); *Knapp-Monarch Co. v. Casco Products Corp.*, 342 F.2d 622, 626-27 (7th Cir. 1965); *Laminex, Inc. v. Fritz*, 389 F. Supp. 369, 374 (N.D. Ill. 1974). Since the evidence in the present case showed that Rite-Way had not used Western's drawings in the manufacture of three-axle mixer units (Pet. App. 5a-6a) and the only evidence of intent was that Western had supplied the drawings to Rite-Way to ensure the availability of replacement parts for the mixer units that Western had manufactured and sold (*id.* at 6a), the court of appeals was quite properly "left with the definite and firm conviction that a mistake ha[d] been committed" by the district court (*United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). *See also* *Commissioner v. Duberstein*, 363 U.S. 278, 291 (1960).

¹¹ In addition to challenging the court of appeals' consideration of the defense of release, petitioners have asserted that one of the

Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend an answer or other pleading should "be freely given when justice so requires." The policy judgment subsumed in that mandate, as well as associated provisions of the Federal Rules governing pleading (*e.g.*, Rule 13(f), Fed. R. Civ. P.), is that artificial procedural obstacles to the full and fair consideration of the merits of controversies should be eliminated to the extent possible. As this Court explained in *Foman v. Davis*, 371 U.S. 178, 182 (1962):

Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; that mandate is to be heeded. * * * In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.—the leave should, as the rules require, be "freely

questions presented by this case is whether "a court, on appeal, [can] ignore the findings of fact made by the district judge and circumvent the mandate of Rule 52, Fed. R. Civ. P., by substituting its own findings of fact and rulings by reliance upon evidence not a part of the record on appeal" (Pet. 3). Petitioners have failed, however, to identify the "evidence not a part of the record on appeal" to which they are referring. Perhaps this is another way of stating petitioners' objection to the court of appeals' consideration of the Rite-Way release. If petitioners are referring to the court of appeals' consideration of the deposition testimony of the General Manager of Rite-Way, which the district court refused to receive, we submit that the court of appeals correctly concluded that such refusal was unjustified (Pet. App. 6a). Insofar as petitioners are referring to some other item of evidence, or are seeking to raise an issue that we have not perceived, we are content to rely upon the opinion of the court of appeals. It is well established, of course, that Rule 52 does not preclude a court of appeals from reversing the findings of a district court. *See* n. 10 *supra*.

given." Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

In refusing to permit Western to amend its answer expressly to plead the defense of release, the district court simply stated that Western could have sought leave to amend at some earlier time and that permitting the amendment would have imposed "an unreasonable burden upon the Court and the opposing party * * *" (Pet. App. 44a). It is settled, however, that the mere passage of time between an initial filing and an attempted amendment is not a sufficient reason for denying a motion to amend (*e.g.*, *Spartan Grain & Mill Co. v. Ayers*, 517 F.2d 214, 220-21 (5th Cir. 1975), and permitting Western to add the defense of release would not have required the reopening of any portion of the record previously closed or delayed the trial of petitioners' inducement claim.¹²

¹² This case is thus unlike *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), relied upon by petitioners (Pet. 18). In contrast to the present case, Hazeltine had not sought to raise the defenses of limitations and release until one year after trial. This Court noted that "[t]o have them sustained [Hazeltine's] defenses would have been to deny Zenith the opportunity to prove its recoverable damages—a denial that hardly comports with the letter or the spirit of the Rule 15(a)" (*id.* at 331). Moreover, permitting Zenith to perfect its proof of damages in light of the defenses proffered by Hazeltine would not have eliminated the prejudice to Zenith since that "would, of course, have required reopening of the record and a virtual retrial of the issue of damages" (*ibid.*)—all without any apparent justification for Hazeltine's failure to raise the defenses of limitations and release at an earlier point in the proceedings.

As already noted, well before the trial on the inducement claim the district court and the parties had focused upon the Rite-Way release in connection with Western's contention that petitioners' inducement claim was too insubstantial to provide a predicate for the district court's exercise of pendent jurisdiction over their breach of contract claim. And the district court had fully considered the significance of the release in ruling against Western (Pet. App. 28a). Moreover, it was not until February 1976, when the court of appeals denied Western's motion for a stay of any further proceedings in the district court, that it became apparent that the trial of the inducement claim was likely to proceed concurrently with the prosecution of Western's appeal from the district court's judgment on the breach of contract claim. Western moved expeditiously thereafter to complete its preparation for trial and to amend its answer to add the defense of release. Given these circumstances, the refusal of the district court to allow an amendment to the answer before trial was captious, and the court of appeals' consideration of the defense was entirely proper. While petitioners urged in the courts below that the release did not operate to release Western, they do not urge the court of appeals' contrary conclusion as a ground for review by this Court; their grievance is not only purely procedural but, as has been shown, is without substance.¹³

¹³ Although petitioners suggest that the court of appeals' consideration of the release issue denied them "the opportunity to present the numerous defenses that they believe they could properly invoke to demonstrate that the alleged release is neither in law nor in fact what respondent contends" (Pet. 19), they have made no effort to specify what defenses they might have presented. Petitioners have never disputed the validity of the Rite-Way release,

2. Quite candidly, petitioners assert as the primary reason justifying review of this case, not the holding of the court of appeals, but the asserted desirability of using this case as the equivalent of a rulemaking proceeding to inquire into the judicial process in the Tenth Circuit (Pet. 2). According to petitioners, three members of the Court of Appeals (Chief Judge Lewis and Judges Breitenstein and McWilliams) harbor such animosity toward Judge Ritter that "they presume error and reverse, almost as a reflex, any judgment rendered by Judge Ritter (Pet. 15.)." Petitioners propose a variety of measures to deal with the alleged bias of members of the court of appeals: "review, referral to a master, or remand to an unbiased panel of judges from outside the circuit" (Pet. 20).

although they had ample opportunity to do so in responding to the jurisdictional contentions advanced by Western during the breach of contract phase of the case. Neither have they ever contended that any of the provisions of the release expressly reserve any right of action they otherwise might have had against Western. Thus, even if the court of appeals had proposed to "bas[e] its decision almost entirely on the so-called release" (Pet. 18-19), a remand for further proceedings in the district court would have been meaningless since, under applicable Utah law, the release of an obligor without an express reservation of pre-existing rights of action against a joint obligor operates to release such joint obligor from liability arising out of the matter encompassed by the release. *E.g.*, *Matland v. United States*, 285 F.2d 752, 755 (3d Cir. 1961); *Melo v. National Fuse & Powder Co.*, 267 F. Supp. 611, 613 (D. Colo. 1967); *see also Dawson v. Board of Education*, 118 Utah 452, 222 P.2d 590 (1950); *Green v. Lang Co.*, 115 Utah 528, 206 P.2d 626 (1949).

¹⁴ The opinion of the court of appeals in this case was written by Judge Doyle for himself and Judges McWilliams and Barrett (Pet. App. 1a). Petitioners have not directed any of their allegations of bias against Judges Doyle or Barrett, and at no time did they request that Judge McWilliams remove himself from the panel.

Petitioners do not claim that the asserted animosity was brought to bear in any specific way in the resolution of this case by the court of appeals. The judge who wrote the opinion and one of the members of the panel, *i.e.*, a majority, are not even among those judges charged with bearing such animosity. No objection on grounds of bias or prejudice was made prior to or during the argument on the appeal. Nothing in the demeanor of the judges on the panel and no passage in the opinion is pointed to as bearing out the serious charges advanced by petitioners. Indeed, the court's resolution of the pendent jurisdiction issue on which it sustained Judge Ritter in less than compelling circumstances (Pet. App. 15a) quite belies the charge that the court of appeals presumes error in his decisions.

Even, however, if it were to be concluded that some action should be taken to relieve such tension as may exist in the Tenth Circuit, review of this case would be a singularly inappropriate way to accomplish such relief. The considerations that would govern any corrective action far transcend the narrow issues in this case. Accordingly, the parties, through briefs, arguments or otherwise, would be of no aid to the Court. To seek resolution within the adversary system of the matters raised by petitioners and supported by Judge Ritter would be to stretch that system far beyond its capability. Should the judges of the court of appeals, for example, be asked to respond to Judge Ritter's affidavit?¹⁵

¹⁵ Petitioners' purported showing of bias is based in large part upon data indicating that judgments rendered by Judge Ritter have been reversed on appeal at a rate that exceeds the national average for district courts. The incidence of such appellate

Even if a general review of the relationship between Judge Ritter and certain members of the Tenth Circuit were deemed warranted, that review can be accomplished through the Judicial Conference or through legislative or other action by the Congress. But certainly a matter of such dimension should not be tackled by this Court in the context of a private dispute in which the narrow issue is whether the court of appeals erred in considering a defense, not essential to the court's decision, which had been fully considered by the district court and the parties notwithstanding the refusal of the district court to allow a formal amendment of the answer before trial.

reversals may stem, of course, from a variety of factors having nothing to do with bias on the part of the reviewing court. Petitioners' related suggestion (*e.g.*, Pet. 16) that a higher than average rate of reversal on appeal creates the "appearance" of bias, which in turn violates the right of appellees to due process, finds no support in decisions of this or any other court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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